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ORIGINAL

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Supreme Court, U.S.
FILED
FEB 16 1993
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FEB 17 1993

No. 92-5653

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DORSIE LEE JOHNSON

Petitioner,

V.

THE STATE OF TEXAS

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED IN MR. JOHNSON'S ORIGINAL PETITION

1. Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age [nineteen] at the time of the offense?

2. If, during voir dire in a capital case, a prospective juror states that she would not consider a teenage capital defendant's youth to be a mitigating factor in rendering a decision on punishment, should the trial judge dismiss the prospective juror for cause at the request of defense counsel?

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This Court's recent decision in Graham v. Collins, ___ U.S. ___, No. 91-7580 (U.S. Sup. Ct., January 25, 1993), casts new light on the merits of Mr. Johnson's Petition for Writ of Certiorari. To assist the Court in resolving his Petition in light of Graham and Penry v. Lynaugh, 492 U.S. 302 (1989), Mr. Johnson supplements his Petition to bring the following matters to the Court's attention:

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE IMPORTANT QUESTION GRAHAM NECESSARILY LEFT UNANSWERED: WHETHER, IN THE ABSENCE OF ADDITIONAL INSTRUCTIONS, MR. JOHNSON'S JURY COULD GIVE THE MITIGATING QUALITIES OF HIS YOUTH FULL CONSIDERATION UNDER THE FORMER TEXAS "SPECIAL ISSUES."

This Court granted certiorari in Graham v. Collins, ___U.S.___, No. 91-7580, to determine whether the former Texas "special issue" questions, conditionally endorsed in Jurek v. Texas, 428 U.S. 262 (1976), without additional instructions, permitted the jury to consider and give full mitigating effect to a defendant's youth.[1] Because this Court ultimately resolved Graham without reaching the merits of his claim,[2] this important issue remains undecided. As Justice Souter has recognized, Mr. Johnson's case presents the same federal constitutional question, and no procedural barrier precludes this Court from reaching the merits.

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[1] Graham presented the question whether a State might "limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account;" he also asked this Court to resolve whether a State could "similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background." Graham v. Collins, No. 91-7580, Petition for Writ of Certiorari.

[2] This Court denied relief in Graham because it determined that the "rule" Mr. Graham sought would not have been "dictated" by existing precedent at the time his conviction and sentence became final, and thus that any such pronouncement on federal habeas corpus could not be applied retroactively to his case. See Graham, slip op. at XXX; see generally Teague v. Lane, citee. Because this Court resolved the threshold question of retroactivity against Mr. Graham, it did not rule on the merits of his Penry challenge.

See Graham, slip op. (dissenting opinion of Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.) at 9 n.5. Accordingly, this Court should grant review to consider whether the Eighth Amendment requires that a jury weighing the fate of a youthful defendant receive additional instructions beyond the unadorned "special issues" of the former Texas scheme. As detailed infra, two independent but related principles support this Court's extension of Penry to evidence of youth. First, legal tradition (as reflected in this Court's teachings) and human experience acknowledge the paramount relevance of youth as a factor which may appropriately justify leniency. Second, this Court's Eighth Amendment precedents have consistently recognized the importance of allowing a capital sentencer fully to consider every substanial aspect of a defendant's mitigating evidence. These two compelling lines of authority require this Court to consider whether the former Texas sentencing scheme was constitutionally adequate as applied to evidence of youth.

1. The question this Court intended to address in Graham remains unresolved, and still merits this Court's plenary consideration.

This Court granted review in Graham because the substantive question presented -- whether the former Texas "special issue" questions too narrowly confined the jury's discretion to impose a life sentence based on a seventeen-year-old defendant's youth and troubled background -- directly implicated the scope of its previous decision in Penry v. Lynaugh, 492 U.S. 302 (1989). That opinion had produced striking conflicts among state and federal

courts; for example, the Oregon Supreme Court plainly read Penry as a broad rejection of the Texas "special issue" format (which Oregon's scheme duplicated), and accordingly required resentencing in almost every case. See State v. Wagner, 786 P.2d 93 (Or. 1990) (opinion on remand from this Court in light of Penry).[3] The Texas Court of Criminal Appeals, on the other hand, ironically has interpreted Penry as affecting only those cases where evidence of mental retardation was presented. See, e.g., Ex Parte Bell, No. 57,898 (Tex. Crim. App., November 6, 1991).[4] Of course, the U.S. Court of Appeals for the Fifth Circuit, in its own Graham opinion,

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[3] See also State v. Moen, 786 P.2d 111 (Or. 1990) (diminished culpability based on defendant's drinking and attempt to prevent one of the victims from obtaining drugs); State v. Farrar, 786 P.2d 161 (Or. 1990) (evidence that defendant's mother had suffered from multiple sclerosis, that his father was mentally ill and violent, and that defendant suffered from a growth disease, had to be institutionalized, repeately attempted suicide, did not learn to read and write until he was incarcerated, and abused drugs), cert. denied, 111 S.Ct. 212 (U.S. 1990); see also State v. Rose, 810 P.2d 839 (Or. 1991); State v. Walton, 809 P.2d 81 (Or. 1991); State v. Pinnell, 806 P.2d 110 (Or. 1991); State v. Stevens, 806 P.2d 92 (Or. 1991); State v. Douglas, 800 P.2d 288 (Or. 1990); State v. Simonsen, 798 P.2d 241 (Or. 1990); State v. Guzek, 797 P.2d 1031 (Or. 1990); State v. Smith, 791 P.2d 836 (Or. 1990); State v. Montez, 789 P.2d 1352 (Or. 1990); State v. Nefstad, 789 P.2d 1326 (Or. 1990); State v. Miranda, 786 P.2d 155 (Or. 1990).

[4] See also Ex Parte McGee, 817 S.W.2d 77 (Tex. Crim. App. 1991); Ex Parte Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991); Ramirez v. State, 815 S.W.2d 636 (Tex. Crim. App. 1991). The sole exception is Gribble v. State, 808 S.W.2d 65 (Tex. Crim. App. 1990) (mitigating evidence of psychosexual fantasy which, when combined with drug or alcohol consumption, caused violent behavior, required resentencing under Penry). Gribble today survives only in dissenting opinions. See, e.g., Boyd v. State, 811 S.W.2d 105, 130 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Black v. State, 816 S.W.2d 350, 376 (Tex. Crim. App. 1991) (Clinton, J., dissenting); Ex Parte Earvin, 816 S.W.2d 379, 381 (Tex. Crim. App. 1991) (Clinton, J., joined by Maloney, J., dissenting); Ex Parte Baldree, 810 S.W.2d 213, 220 (Tex. Crim. App. 1991) (Baird, J., dissenting).

narrowed the potential reach of Penry in a manner described by four Members of this Court as "plainly at odds with [this Court's] controlling Eighth Amendment precedents." Graham, slip op. at 10 (dissenting opinion of (Souter, J., joined by Blackmun, Stevens, and O'Connor, JJ.) (citing Graham v. Collins, 950 F.2d 1009, 1027, 1029 (5th Cir. 1992) (en banc).

This basic conflict over the commands of the Eighth Amendment survives this Court's disposition of Graham, since Graham does not answer whether Penry's analysis applies to mitigating evidence other than mental retardation and childhood abuse. If anything, dicta in the majority opinion in Graham[5] only further complicates the issue and requires this Court's attention. That dicta, suggesting the "limited nature" of Penry's holding, is flatly at odds both with Penry itself and with Penry's adoption of the reasoning of Justice O'Connor's concurring opinion in Franklin v. Lynaugh, 487 U.S. 164 (1988). See Graham, slip op. at 12-13, 13 n.3; compare Penry, 492 U.S. at 318, 322. As four Justices point out in Graham, Penry "lends no support for these limitations [on the full consideration of mitigating evidence];" indeed, not just the evidence described in Penry but other "categories of mitigating fact" may exceed the scope of the narrow former "special issues." Graham, slip op. at 10, 12 (dissenting opinion of Souter, J.,

[5] The majority had previously determined that review of the merits of Graham's Eighth Amendment challenge was barred by Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); see Graham, slip op. at 10-11 (concluding that existing precedent in 1984, when Graham's case became final, would not have "dictated" the result he sought); thus, this portion of the majority's discussion was unnecessary to its disposition of the case.

joined by Blackmun, Stevens, and O'Connor, JJ.).

In short, Franklin raised substantial doubts whether the former Texas "special issues," in the absence of supplemental instructions, continued in all cases to satisfy the commands of the Eighth Amendment after Eddings v. Oklahoma, 455 U.S. 104 (1982). See Franklin, 487 U.S. at 186 (O'Connor, J., joined by Blackmun, J., concurring). Penry confirmed this surmise and strongly implied that the "special issue" questions would require additional jury instructions to pass constitutional muster if the defendant presented any relevant mitigating evidence exceeding their scope. Graham, precluded by a procedural rule from reaching the merits of precisely such a challenge, fails to resolve this open question. This Court should grant certiorari in Mr. Johnson's case to authoritatively answer it.

2. Our legal tradition and our life experience accord youth special status as a mitigating factor.

If this Court has recognized a single mitigating factor as indispensably relevant to the choice between life and death, it is the youth of the defendant. Indeed, this Court's very first decision reaffirming the constitutionality of capital punishment after Furman v. Georgia, 408 U.S. 238 (1972), acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (e.g., his youth, ...)

Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court). Since Gregg, this Court has repeatedly emphasized the mitigating relevance of youth, and the importance of giving it the fullest consideration. In Lockett v. Ohio, 438 U.S. 586 (1978), for example, this Court struck down the Ohio capital setencing scheme as applied because, inter alia, "considerations of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." Lockett, 438 U.S. at 608 (emphases added). Similarly, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court distinguished "the chronological age of a minor" from the attendant infirmities of youth, and held that a constitutional capital sentencing statute had to permit the sentencer to consider and give effect to both. See Eddings, 455 U.S. at 115-116; see also id. at 118 (O'Connor, J., concurring) ("extraordinary measures" proper to ensure reliability of sentence for youthful defendant).

Finally, although this Court has concluded that the Eighth Amendment permits the execution of juvenile defendants, it has specifically required that the sentencer first be permitted to consider the defendant's age in mitigation of punishment. Stanford v. Kentucky, 492 U.S. 361, 375 (1989). Other courts have confirmed the special status of youth as a mitigator, echoing this Court's conclusions with respect to its powerful mitigating relevance. See, e.g., State v. Searcy, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when crime manifested "exceptional

depravity," is "sufficient to avoid capital punishment").[6]

This Court's pronoucements reflect a broad historical and contemporary social consensus that the fact of youth itself is mitigating. The reason for this near-universal agreement is simple: while most jurors have not experienced the afflictions sometimes proffered in mitigation of a capital sentence (mental retardation, mental illness, an abused childhood, drug addiction), everyone has been young. Thus, every juror can recall -- in themselves or others -- the confusion, impulsivity, and poor judgment that may attend a young person's thought and action from adolescence into young adulthood, and appreciate why such limitations justify a sentence less than death. Exactly because nineteen-year-old Dorsie Johnson's jurors would have grasped the mitigating significance of his youth intuitively, as well as rationally, their instructions must permit them enough latitude to give effect to its every substantial mitigating aspect.

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[6] See also State v. Barber, 753 S.W.2d 659, 669 (Tenn. 1988) (jury entitled to impose lesser sentence based on youth even when defendant was 29 years old); Moore v. Balkcom, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"); People v. Frank, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important [mitigating] factor in his case"); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (defendant's youth "is a powerful mitigating circumstance").

3. This Court's Eighth Amendment decisions have always protected a capital defendant's right to the consideration of relevant mitigating evidence

The development of this Court's capital sentencing jurisprudence in the modern death penalty era[7] reflects its recognition that the Eighth Amendment mandate of individualized sentencing requires that the sentencer be permitted to consider every substantial aspect of the defendant's character and background in deciding whether to impose death. This consideration of the unique facts and circumstances of each particular case helps ensure that the sentence imposed will express a "reasoned moral response" to both the offender and the offense. See, e.g., California v. Brown, 479 U.S. 538 (1987); Penry, 492 U.S. at 328. Only thus is the constitutional requirement of "heightened reliablity," a necessary safeguard when the ultimate penalty is available,[8] satisifed. As explained infra, this Court's systematic exposition of these principles since 1978 compels the conclusion that the former Texas statute simply does not permit a jury sufficient latitude to give mitigating effect to a teenage defendant's youth. A review of how consistently this Court has applied the central insight of its capital sentencing jurisprudence

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[7] This Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), swept away the confused tangle of state capital sentencing laws then in existence, which had resulted in such an arbitrary and capricious imposition of the ultimate sanction that the Eighth Amendment could no longer tolerate them. What may fairly be called "the modern death penalty era" began four years later, with this Court's comprehensive review of the facial constitutionality of the post-Furman statutes. See text infra.

[8] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

from Lockett v. Ohio, 438 U.S. 586 (1978) to Penry, illustrates why this Court should grant review in Mr. Johnson's case.

The history of this Court's articulation of the requirement of individualized sentencing in capital cases, of course, does not begin with Lockett. Lockett was rooted in this Court's 1976 decisions upholding the post-Furman capital sentencing statutes of Georgia, Florida, and Texas against facial attack.[9] In particular, Lockett is immanent in Woodson v. North Carolina, 428 U.S. 280 (1976), and anticipated by Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977). A brief rexamination of those precedents will illuminate this Court's subsequent holding in Lockett, and show why Lockett dictated the result in Penry and compels application of its rule to evidence of youth.

Woodson invalidated North Carolina's post-Furman death penalty scheme, which mandated a death sentence for any person convicted of "first degree murder" as defined by statute. Woodson, 428 U.S. at 286. This Court fouund the manditory character of the punishment unconstitutional, because the statute denied the sentencer an opportunity to consider "the character and record of the individual offender and the circumstances of the particular offense" in determining whether death was the appropriate punishment. Id. at 304. Woodson thus recognized individualized sentencing as "a constitutionally indispensable part of the process of inflicting

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[9] See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).

the penalty of death" in the post-Furman era. Id.[10]

The next Term, faced with another, somewhat narrower mandatory sentencing statute,[11] this Court reaffirmed and strengthened its commitment to the necessity of individualized sentencing under the Eighth Amendment:

> [I]t is incorrect to assume that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance ... are all examples of mitigating facts which might attend the killing of a peace officer and are considered relevant in other juridictions. ... [I]t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.

Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977) (emphasis added).

Thus by 1977 this Court had recognized that states were constitutionally required to afford individualized consideration to defendants facing the death penalty; what the Court fashioned in 1978 was a simple and easily applied rule expressing this central tenet. Acknowledging "an obligation to reconcile previously differing views," this Court fashioned the rule that remains the unifying principle of death penalty jurisprudence -- the conclusion that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant profers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 602, 604 (1978) (notes omitted) (emphasis in original).[12]

A majority of the Court soon adopted the reasoning of the Lockett plurality. In Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court again emphasized the primacy of Lockett's bright-line rule:

> By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 107; see also id. at 114-115.

Two 1987 cases usefully illustrate this Court's unwavering adherence to the rule of Lockett, and its willingness to reexamine previously approved statutory models to ensure that they continue to conform to its mandate. First, this Court reconsidered the Florida statute it had facially approved in Profitt, to determine whether that scheme passed muster as applied under Lockett by

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[10] The Court reiterated this holding the same day in striking down Louisiana's mandatory sentencing scheme in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)

[11] The statute at issue mandated a death sentence for anyone convicted of murdering a police officer in the line of duty. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 634-635 (1977).

[12] The reference in this passage to the "rarest kind of capital case," in which consideration of mitigating evidence might not be constitutionally required, reflects that this Court on several occasions left open the possibility that an extremely narrowly defined capital offense -- e.g., murder by a prisoner already serving a life sentence -- might justify a mandatory death penalty. When squarely faced with the issue, however, this Court firmly rejected the notion that the Eighth Amendment could permit death to be imposed without the sentencer having considered the reasons not to do so. Sumner v. Shuman, 483 U.S. 66 (1987); see text infra.

permitting the sentencer full discretion to consider and give effect to mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Hitchcock had introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. This Court noted that the Florida statute under which Hitchcock was sentenced limited "mitigating circumstances" to an enumerated list, that the jury had been so instructed, and that some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the statutory list. Id. at 396-398. Justice Scalia held for a unanimous Court that such a proceeding "d[oes] not comport with the requirements of ... Lockett," and reversed Hitchcock's death sentence.[13] Id. at 399.[14]

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[13] The Court noted, of course, that the State was "not precluded from seeking to impose a death sentence upon [Hitchcock], 'provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'" Hitchcock, 481 U.S. at 399, citing Skipper v. South Carolina, 476 U.S. 1 (1986).

[14] Thus Hitchcock, like Penry, involved a reexamination -- in light of Lockett and Eddings -- of a statute found facially constitutional at the dawn of the post-Furman era. Although in 1976 the statute approved in Proffitt had not "clearly operated ... to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute as applied had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the categories enumerated by the Proffitt scheme. See Penry, 492 U.S. at 317 (quoting Lockett, 438 U.S. at 607).

Later that Term, in Sumner v. Shuman, 483 U.S. 66 (1987), the Court emphasized that even in a very narrowly defined, highly aggravated catagory -- murder by a prisoner serving a sentence of life without parole -- Lockett forbade an automatic sentence of death upon conviction. As the Court explained,

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they also say nothing of the [circumstances] such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existance of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 81-82 (citation omitted). Since such factors could reasonably support a sentence less than death notwithstanding the existence of serious aggravating evidence, the statute's silence concerning the consideration of mitigating evidence violated the Eighth Amendment. Mindful of the unbroken history of its application of the bright-line Lockett rule, this Court concluded:

> [A]ny legitimate state interests can be satisfied fully through the use of a guided discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures. Having reached unanimity on the constitutional significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today.

Id. at 85.

These two decisions are representative of this Court's wide-ranging enforcement of the Lockett principle, which led it to reexamine the former Texas statute a year later. Franklin v. Lynaugh, 487 U.S. 164 (1988). In Franklin, five justices of this Court expressed serious doubts about the vitality of that model, as

applied, after Lockett and Eddings. See Franklin, 487 U.S. at 186 (O'Connor, J., joined by Blackmun, J., concurring). Those doubts were confirmed a year later, when this Court held that in particular cases the former Texas special issue questions could run afoul of Lockett. Penry v. Lynaugh, 492 U.S. 302 (1989). In Penry, the Court held that the Texas statute was inadequate to permit the consideration, as mitigating, of evidence of mental retardation and childhood abuse. Penry, 492 U.S. at 323-325. The Court concluded that a reasonable juror could have determined that Penry acted "deliberately" as that term was commonly understood, that he would likely be dangerous in the future, and that his response to any provocation had been unreasonable. Penry, 492 U.S. at 322-325. At the same time, however, the Court explained that the relevance of Penry's mitgating evidence to an appropriate sentence was not exhausted by its probative relationship to the three "special issue" interrogatories. See Penry, 492 U.S. at 323-327. In other words, despite the fact that Penry's mitigating evidence did not raise a reasonable doubt concerning any one of the three special issues, a juror could still rationally have concluded that it warranted a life sentence rather than the death penalty. Penry thus recognizes that a jury's conclusion about whether a particular defendant deserves death -- based on the evidence -- may not be accurately reflected in its answers to the "special issues" of the former Texas statute. The Eighth Amendment forbids imposition of the death penalty upon such a defendant, if the sentencer has no means to prescribe a less severe punishment based

on his mitigating evidence.

This brief review illustrates how this Court's Eighth Amendment teaching, from Woodson to Penry, has refined the requirement that a capital sentencer consider the defendant's mitigating evidence before imposing sentence. The core insight of these cases, which finds its fullest expression in Penry, is that the sentencer must be empowered to give effect to every substantial aspect of a defendant's mitigating evidence -- not just those that bear on "deliberate" conduct or the possibility that a defendant may pose a "continuing threat" to society. This conclusion is especially powerful where the relevance of the mitigating evidence in question -- e.g., the defendant's youth --lies precisely at the intersection of our legal tradition and human experience. This Court should grant plenary review and confirm that nineteen-year-old Dorsie Johnson's youth could, by itself, have supported a sentence less than death, and that, had his jury been properly instructed, it could have given effect to this commonsense conclusion.

Respectfully submitted,

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No. 92-5653

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **Supplement to Petition for Writ of Certiorari** were served on counsel for Respondent by placing same in United States Mail, first-class postage pre-paid, return receipt requested, addressed to: **Enforcement Division, Office of the Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711**, this 16th day of February, 1993. I further certify that all parties required to be served have been served.

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